APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 217

October Term, 1955

(Argued January 18, 1956 Decided July 30, 1956)

Docket No. 23849

EDWIN M. REID, doing business as COLLEGE BOOK EXCHANGE, *Plaintiff-Appellant,*

v.

HARPER & BROTHERS, *Defendant-Appellee.*

Before: MEDINA, HINCKS and WATERMAN, *Circuit Judges.*

Plaintiff, Edwin M. Reid, appeals from a judgment of the United States District Court for the Southern District of New York, Palmieri, *J.*, for defendant, Harper & Brothers, entered upon a jury's verdict in plaintiff's treble-damage action brought under § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). Affirmed.

EDGAR HILLS (Campbell & Hills), New York City; Thurman Arnold, Norman Diamond (Arnold, Fortas & Porter), Washington, D. C.; Edward G. Harris (Harris and Sell), Toledo, Ohio, *for plaintiff-appellant.*

ALEXANDER S. ANDREWS, New York City (Horace S. Manges, Jacob F. Raskin, Ira M. Millstein, Weil, Gotshal & Manges, New York City, of counsel), *for defendant-appellee.*

WATERMAN, *Circuit Judge:*

Plaintiff, Edwin M. Reid, doing business as The College Book Exchange, brought this action under § 2a of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat.

1526, 15 U.S.C. § 13(a), alleging that defendant, Harper & Brothers, had violated the Act by charging him higher prices for its books than it charged his competitors, thereby rendering him unable to compete in the sale of Harper's books. Treble damages were sought pursuant to Section 4 of the Act, 15 U.S.C. § 15. He appeals from a judgment against him entered upon a jury verdict for the defendant and from the denial of his motion to set aside the verdict and grant a new trial.

Plaintiff is engaged in the sale of books in Toledo, Ohio. The defendant is a book publisher in New York City. During the ten year period from 1941 to 1950, plaintiff's total purchases from defendant amounted to $46,396.83, or approximately 3½% of his purchases from all publishers. The aggregate difference in prices charged plaintiff, as compared with those paid by plaintiff's alleged competitors, was claimed to be $4,101.57, or an average of $410.00 a year. Plaintiff alleged that he was in competition with eight firms that acted as defendant's wholesalers, distributing books for defendant in various locations throughout the United States. Harper & Brothers conceded that its prices to Reid were higher than to several of its other customers during the period in question. The defendant sought to justify this disparity, however, on the basis of differences in cost between its sales to Reid, and its sales to the other named customers. The relevant section of the Act authorizing such a defense provides "That nothing contained [herein] * * * shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *" 49 Stat. 1526, 15 U.S.C. § 13(a). Harper contended that the total difference between the prices it charged Reid and those that he would have paid if treated like the other purchasers amounted to $3,211.00. It then introduced the testimony and report of an independent accountant in order to justify this differential. The account-

ant had prepared a detailed comparison between "billing, bookkeeping and shipping" costs on transactions with Reid and transactions with three of its largest jobbers. This cost study indicated a saving of $1,430.00 in dealings with the latter. In addition, the defendant testified to further cost savings, attributable to the purchasing patterns of the three jobbers and from the elimination of certain collection expenses incurred in dealing with plaintiff. These items were characterized as "intangible" during the trial. In addition to testimony concerning general production economies, there was evidence that the plaintiff, in contrast to the three jobbers, was on occasion dilatory in paying his bills.

The trial judge properly left to the determination of the jury, as questions of fact, whether plaintiff was in competition with the favored purchasers, whether plaintiff was the victim of discrimination, and whether the effect of such discrimination, if any, was to injure the plaintiff's ability to compete with the other purchasers. Only if the jury be considered to have answered each of these questions in the affirmative, do we reach the questions raised by this appeal which are concerned primarily with the cost justification defense. Plaintiff also claims reversible error because of an alleged prejudicial comment of the trial judge on the evidence.

In connection with the cost justification defense, plaintiff contends that the trial judge improperly charged the jury in three respects, which will be discussed *seriatim*.

First, plaintiff alleges that it was error for the court to permit the jury to consider the "intangible cost savings," claimed by defendant, incident to book production and to the collection of bills. Although price differentials ought to be justified by concrete and specific evidence of cost variances in dealing with different purchasers, and not by conjectural accounting estimates alone, *Automatic Canteen Co.* v. *F. T. C.*, 1953, 346 U. S. 61, 68, it was not error to allow the jury to consider this evidence. The trial court

pointed out the failure of defendant to introduce precise data, and properly discounted the weight of this evidence by adverting to "these intangible elements" as being the proper subjects of consideration only "for what they are worth."

Second, plaintiff also alleges error in that part of the charge concerning the validity of the accounting procedure embodied in defendant's cost study. Since Harper had no relevant cost records for the period of 1941 to 1950, the accountant hired to prepare the study used figures for 1951, adjusted backwards on the basis of general salary rates published by the Commerce and Industry Association of New York. Although such an accounting method obviously lacks the full measure of desired precision, it appears to have been undertaken in good faith and to accord with the minimal requirements of sound accounting principles. Indeed, under the circumstances, it appears to have been the best available procedure. Both the courts and the Federal Trade Commission have recognized the dilemma confronting defendants in suits such as these, and have liberally accepted data derived from litigation-inspired accounting methods. See e.g., *American Can Co.* v. *Russellville Canning Co.*, 8 Cir. 1951, 191 F. 2d 38, 59, and *In re Minneapolis Honeywell Regulator Co.*, 1948, 44 F. T. C. 351, 394. Moreover, the trial court correctly charged the jury that it was "up to you as to whether you wish to accept or reject the assumptions made by Gayle [defendant's accountant] and the conclusions which he drew from them."

A further contention of plaintiff is that the court erred in refusing to charge that defendant's cost study improperly calculated comparative costs for plaintiff and defendant's three largest jobbers, by averaging total shipments on a cumulative basis for an entire year. The complaint is that this approach uses savings realized on large transactions with the favored customers to justify discrimination in their favor on transactions involving smaller

quantities, equivalent to plaintiff's purchases. To require a seller in these circumstances to justify the cost differential in each and every transaction with his buyers, rather than on the aggregate basis of their dealings, would prove unduly onerous. The impact of such requirement might be to discourage *all* price differentials, even those actually justified by cost distinctions. Absent a showing that the lack of uniformity in the price spread had any competitive significance, the FTC has permitted the use of aggregate cost differences to justify price differentials. See, e.g., *In re Sylvania Electric Products, Inc.*, 1954, FTC Docket No. 5728, 3 CCH Trade Reg. Rep. ¶ 25,181. Such a method was permissible in this case. Furthermore, the trial court left the ultimate validity of this computation to the determination of the jury.

Third, plaintiff alleges that the court erred in charging the jury that it could deduct *pro tanto* from the amount of damages, if any, the extent of saving resulting from the transactions with the favored customers. Although one court has approved this partial justification approach, see *American Can Co.* v. *Russellville Canning Co.*, 8 Cir. 1951, 191 F. 2d 38, 56, it is not necessary for us to consider its validity since the jury returned a verdict in favor of defendant and therefore never reached the question of the measure of damages.

With respect to the alleged prejudicial comment, the plaintiff claims that the trial court in his charge to the jury unduly emphasized a letter written by plaintiff to his creditors shortly after a fire had destroyed his office building. The letter indicated that plaintiff was unable to pay his debts at that time because all available cash, including insurance proceeds, was being used to convert the building into an apartment house. The trial judge alluded to this letter in respect to its bearing on the plaintiff's credibility as a witness, since it contradicted his oral testimony. Plaintiff's testimony was an essential ingredient of his case, as evidenced by his appearance on the witness stand

on five successive days, and it was not error for the court to advert to that evidence. Great discretion is accorded federal judges in commenting on portions of the evidence, and even in expressing opinions with regard thereto, provided it is stated that the jury is the exclusive judge of the facts and need not adopt any opinion expressed. *Quercia* v. *United States*, 1933, 289 U. S. 466, 469-470; *Pager* v. *Pennsylvania Rail Co.*, 2 Cir. 1947, 165 F. 2d 56, 58; *Flint* v. *Youngstown Sheet and Tube Co.*, 2 Cir. 1944, 143 F. 2d 923, 925. These precautions were observed by the court. Furthermore, the trial judge properly informed the jury that the plaintiff's motive for bringing the action had absolutely no bearing on his rights under the Robinson-Patman Act, but was relevant only to the extent that it bore on his credibility as a witness.

Since the trial court did not err in its instructions to the jury, but rather left to it the determination of all issues of fact after proper instructions on the law, the judgment below must be affirmed.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York on the 30th day of July one thousand nine hundred and fifty-six.

Present: HON. HAROLD R. MEDINA, HON. CARROLL C. HINCKS, HON. STERRY R. WATERMAN, *Circuit Judges.*

EDWIN M. REID, d/b/a COLLEGE BOOK EXCHANGE,
Plaintiff-Appellant,

v.

HARPER AND BROTHERS, *Defendant-Appellee.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO
Clerk
By RALPH C. CURCIO
Deputy Clerk

Office - Supreme Court, U.S.
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NOV 26 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 526

EDWIN M. REID, doing business as COLLEGE BOOK EXCHANGE,

Petitioner,

v.

HARPER & BROTHERS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

HORACE S. MANGES,
60 East 42nd Street,
New York 17, N. Y.,

ALEXANDER S. ANDREWS,
46 Cedar Street,
New York 5, N. Y.,
Attorneys for Respondent.

Of Counsel:
HORACE S. MANGES,
JACOB F. RASKIN,
IRA M. MILLSTEIN,
WEIL, GOTSHAL & MANGES,
60 East 42nd Street,
New York 17, N. Y.

INDEX

	PAGE
Statement	1
Questions Presented	5
(a) This petition essentially seeks a reconsideration, *de novo*, of the facts	6
(b) This case can have no wider applicability than its own particular facts	9
Argument	10
1. The Trial Judge correctly charged that the jury could consider intangible cost savings "for what they are worth". (Answering Petition, Points 1 and 6)	10
Legislative History	10
The Judge's Charge	12
Answering Petition Point 6	13
Answering Petition Point 1	13
2. The Trial Judge correctly charged the jury with respect to the method used in preparing respondent's cost study—Exhibit 00. (Answering Petition, Points 2 and 3)	14
The Gayle Cost Study and How It Was Prepared	14
Answering Petition, Points 2 and 3	17
(a) The adjusted figures	17
(b) Non-inclusion of all elements of cost	18
3. The Trial Judge adequately and correctly charged the jury with respect to the basis used by respondent for comparing the costs of doing business with petitioner and petitioner's alleged chief competitors. (Answering Petition, Point 4)	19

PAGE

4. Any questioning concerning the Trial Judge's charge that a partial cost justification could be deducted *pro tanto* from an award of damages is moot (Answering Petition, Point 5) 22

5. The Trial Judge acted entirely within his prerogative in commenting, as he did, on Defendant's Exhibit P (Answering Petition, Point 7) 24

Conclusion 26

Table of Cases Cited

American Can Co. v. Bruce's Juices, Inc. (5th Cir., 1951) 187 F. 2d 919 21

American Can Co. v. Russelville Canning Co. (8th Cir., 1951), 191 F. 2d 38 .....14fn, 21

Automatic Canteen Co. v. Federal Trade Commission (1953), 346 U. S. 61 10

Bruce's Juices, Inc. v. American Can Co. (1947), 330 U. S. 743 22

Buckeye Powder Co. v. Dupont Powder Co. (1918), 248 U. S. 55 21

Daniels v. Goldberg (2nd Cir., 1949), 173 F. 2d 911 23

Federal Trade Commission v. Morton Salt Co. (1948), 334 U. S. 37 22

Foster v. Moore-McCormack Lines (2nd Cir., 1942), 131 F. 2d 907, cert. den. 318 U. S. 762 5

In the Matter of Minneapolis Honeywell Regulator Co. (1948), F. T. C. Docket No. 4920, 44 F. T. C. 331 ..... 20fn

In the Matter of Minneapolis Honeywell Regulator Co. (1948), F. T. C. Docket #4920, 44 F. T. C. 351 .....14, 17, 22fn

PAGE

In the Matter of Sylvania Electric Products, Inc. (1954) F. T. C. Docket #5728, 3 C. C. H. Trade Reg. Rep., Pars. 25,181 and 25,197 .....14, 19, 21, 22fn
In the Matter of U. S. Rubber Co. (1939), F. T. C. Docket No. 3685, 28 F. T. C. 1489 ..... 20fn
In the Matter of U. S. Rubber Co. (1950), F. T. C. Docket No. 4972, 46 F. T. C. 998 ..... 20fn

Quercia v. United States, (1933), 289 U. S. 466 23

Rice v. Sioux City Cemetery (1955), 349 U. S. 70 9

Wilkerson v. McCarthy (1949), 336 U. S. 53 ..... 6, 9

Other Authorities Cited

Section 2(a) of the Robinson-Patman Act 1, 2, 7, 8, 10, 14, 20

Supreme Court of the United States, Revised Rules, Rule 19 5

XI Proceedings of American Law Institute 313 (1934) 6

"Cost Justification Report"—A Report to the Federal Trade Commission By the Advisory Committee on Cost Justification under the Robinson-Patman Act 8, 9, 12, 20

80 Cong. Rec. (June 15, 1936), 9417 11

H. R. 8442, Report No. 2287, 74th Cong., 2nd Sess. (Majority Report of Committee on the Judiciary) 12

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RESPONDENT'S BRIEF IN OPPOSITION

Statement

This is an action for damages for alleged price discrimination under Section 2(a) of the Robinson-Patman Act. The entire price differential amounted to a yearly average of about $321 over a ten-year calendar period.

The case involved a jury trial of virtually three court weeks.

The decision of the Court of Appeals does not conflict with any decision of this Court or of any Court of Appeals. Nor does the case raise any important question of federal law warranting review. It does deal with the factual situation of this particular respondent.

The sole basis for petitioner's application is alleged error in the scholarly charge of Trial Judge Edmund L. Palmieri, which has received the unanimous approval of Judges Medina, Hincks and Waterman in the Court of

Appeals. We submit that a reading of that charge † and of the Court of Appeals opinion approving it will demonstrate the fallacy of petitioner's contention that this case involves an incorrect interpretation and application of the cost proviso contained in the Robinson-Patman Act.

Actually, the jury may have never even reached the portions of the charge relating to the cost justification defense about which petitioner complains. It should be borne in mind that, as stated by the Court of Appeals, the Trial Judge had properly left to the jury the questions of (1) whether petitioner had been in competition with the allegedly favored customers, (2) whether petitioner had been the victim of discrimination, and (3) whether there had been any injury to competition by reason of the price discrimination complained of. In this connection the Court of Appeals aptly stated:

> *"Only if the jury be considered to have answered each of these questions in the affirmative, do we reach the questions raised by this appeal which are concerned primarily with the cost justification defense."* (Italics added) (Appendix to Petition, 3a)

Facts

Petitioner, in Toledo, Ohio, is engaged in the sale of books. Respondent is a book publisher in New York City. It was claimed that during the period November 1, 1941, through March 7, 1950, respondent sold its books to petitioner at higher prices than to petitioner's alleged competitors.

During the *entire period* covered by the complaint (spread over ten calendar years), petitioner's total purchases from respondent amounted to $46,396.83 (Pl.'s Ex. R-10, R. 62, Pet. App. C. A. 58 *), and, although claiming

† Pet. App. C. A. 1-45.

* In this brief these designations are used: R.—Trial transcript; Pet. App. C. A.—Petitioner's printed Appendix in Court of Appeals; Res. App. C. A.—Respondent's printed Appendix in Court of Appeals.

to be a wholesaler, he generally carried in stock only about 140 volumes of respondent's books.* The aggregate difference in prices charged petitioner as compared with prices charged petitioner's alleged competitors was claimed by petitioner to amount to an average of $410 per calendar year, or a total of $4,101.57. (Pl.'s Ex. M-2, R. 518, not printed.)

Respondent's proof established that actually the total difference between the prices it charged petitioner and those that he would have paid if treated like petitioner's alleged competitors amounted to $3,211, or an average of $321 per year. (Def.'s Ex. OO, R. 1083; Res. App. C. A., 4a.)

Petitioner's claim of alleged discrimination was based upon his testimony that he was in competition with eight firms (primarily American News Company, Baker & Taylor Co. and A. C. McClurg & Co.). The eight firms were respondent's eight wholesalers, distributing books for respondent in various locations throughout the United States, who were sold books on the basis of respondent's schedule of wholesale prices (R. 920-956).

Respondent introduced testimony showing that petitioner had not engaged in wholesaling activities such as respondent's wholesalers, and that petitioner was not in competition with such wholesalers. (Def.'s Ex. A, R. 154, Res. App. C. A. 29a; Pl.'s Ex. R-19, R. 119, Pet. App. C. A. 57; R. 217, 1057-1058, 1071.)

Despite the foregoing, the petition refers to petitioner as a "jobber" who "competed * * * with respondent's preferred jobbers". The petition states, further, that respondent "conceded" that it had practiced price discrimination against petitioner, and seeks to convey the impression that respondent's sole basis for contesting petitioner's claim was that such discrimination was justified by cost savings.

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* Respondent published between 250 and 300 new titles per year (R. 921), and had 2,500 to 3,000 active titles (R. 922).

Petitioner ignores the fact, as stated by the Court of Appeals, that:

> "The trial judge properly left to the determination of the jury, as questions of fact, whether plaintiff was in competition with the favored purchasers, whether plaintiff was the victim of discrimination, and whether the effect of such discrimination, if any, was to injure the plaintiff's ability to compete with the other purchasers." (Appendix to Petition, 3a)

The cost justification defense was presented primarily in the form of a cost study prepared by William T. Gayle, C. P. A., member of the accounting firm of J. K. Lasser & Co., which firm for many years had been the accountants for respondent and other book publishers.

Mr. Gayle computed the savings to respondent in billing, bookkeeping, and shipping expenses in dealing with its wholesale customers as compared with the same expenses in dealing with petitioner. He found such difference to be $1,430 for the period here involved, thus reducing the aggregate price differential between petitioner and respondent's wholesalers from $3,211 to approximately $1,781, or an average of $178 per year.

With respect to this residual average of $178 per year, respondent introduced additional testimony showing that there were further cost savings attributable to (1) the purchasing pattern of respondent's major wholesalers as compared to that of petitioner, and (2) the elimination of collection expenses incurred in dealing with petitioner. These additional cost savings were referred to by the Trial Judge as "intangible cost savings" to be considered by the jury "for what they are worth". (R. 1257.)

The trial consumed fourteen actual trial days. The testimony consists of over 1,200 pages, and hundreds of pages of exhibits were introduced in evidence.

Petitioner and respondent both submitted to the Trial Judge proposed instructions to the jury. Petitioner submitted 107 proposed instructions, respondent 31. (R. 1539-1598.) The Trial Judge spent an entire day in conference

with counsel for both parties, considering the requested charges. The Judge's charge covers 56 pages (R. 1225A-1281), and took one and one-half hours to deliver.

The Trial Judge charged the jury to return a general verdict (R. 1280) and the jury returned such a verdict in favor of respondent. Petitioner made no request for a special verdict in the form of special written findings on each issue of fact (F. R. C. P. 49(a)), to wit, whether petitioner was in competition with respondent's allegedly favored customers, whether he was the victim of discrimination, and whether the effect of any such discrimination was to injure petitioner's ability to compete with the other customers; nor did petitioner request that the general verdict be accompanied by answers to interrogatories upon these issues of fact. (F. R. C. P. 49(b).)

Actually petitioner, under the guise of alleged questions of law of claimed fundamental importance, seeks by this petition, as he sought by his appeal to the Court of Appeals, to lift the "mantle of impenetrable darkness" cast by a general verdict. This he may not do. *Foster* v. *Moore-McCormack Lines* (2nd Cir., 1942), 131 F. 2d 907, cert. den. 318 U. S. 762.

Questions Presented

Petitioner does not contend that this case presents a conflict between decisions of Courts of Appeal, nor that there has been a decision below which conflicts with a decision of this Court, nor that the decision below so far departs from the accepted course of judicial proceedings as to call for this Court's supervision. (Supreme Court of the United States, Revised Rules, Rule 19.) Petitioner contends, rather, after a lengthy trial by the jury method he selected, that the decision below involves "fundamental" questions concerning the cost proviso of the Robinson-Patman Act. (Petition, 14-15.)

It should first be noted that each of petitioner's "questions presented" was briefed at length and argued to the

Court of Appeals. That Court concluded, after passing upon each of said questions:

> "Since the trial court did not err in its instructions to the jury, but rather left to it the determination of all issues of fact after proper instructions on the law, the judgment below must be affirmed." (Appendix to Petition, 6a)

We submit that the review here attempted is not in the interest of the law, but is solely in the interest of petitioner, who seeks simply another appellate review and a reconsideration of all the facts, *de novo,* involved in a complicated and lengthy jury trial. (Chief Justice Hughes, Address to American Law Institute, May 10, 1934, XI Proceedings of American Law Institute 313 (1934).

Moreover, we submit that this case, perforce, can involve " * * * no more than its particular facts." *Wilkerson* v. *McCarthy* (1949), 336 U. S. 53, 67.

Accordingly, we submit, certiorari should be denied.

(a) This petition essentially seeks a reconsideration, *de novo,* of the facts.

Of petitioner's seven enumerated "questions presented" six deal with alleged "fundamental" legal questions raised by the cost defense submitted by the Trial Judge to the jury for its appraisal. The seventh deals with alleged error by reason of the Judge's comment to the jury with respect to an exhibit in evidence, but the comment is so well supported by authority as to make specious petitioner's claim that it involves a fundamental question of law.

In a search to find "an important question of federal law" in the presentation of the cost study to the jury, petitioner would have this Court postulate an inflexible formula applicable to cost justification defenses for all time and all industries, and this, as a matter of law.

Respondent submits that the propriety of a cost study used in support of a cost justification defense depends upon the particular facts and circumstances of the business of which the study is made. The reasonableness and pro-

priety of each study and of each defense can be bound by no rigid rules, because of the infinity of situations comprised in a complex economy. Rather, the reasonableness and propriety of each study and of each defense are questions of fact in each case.

The views here expressed are buttressed by the report of The Advisory Committee on Cost Justification under the Robinson-Patman Act formed by the Federal Trade Commission to investigate the feasibility of developing standards of proof and procedures for use in cost justification studies. In March, 1956, this Committee reported with the following recommendation:

> "The infinite variations of internal organization, methods of doing business, availability of accounting and statistical data, and other important factors, preclude the possibility of developing uniform methods and procedures of cost accounting for Robinson-Patman Act purposes. It must be assumed that cost justification studies will be entrusted to persons who have intelligence, experience, and imagination to adopt sound accounting principles as found in standard works on the subject and in the practices of business enterprises to the requirements of a particular problem.
>
> The Committee believes that any attempt to lay down detailed procedures for all business enterprises or otherwise to straitjacket cost justification would be self-defeating. For this reason it is the earnest hope of the Committee that the Federal Trade Commission, while approving or disapproving particular approaches in individual instances, will refrain as far as possible from adopting specific rules of accounting analyses exclusive of others, and that it will encourage the application of ingenuity and imagination in this complex area.
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> • • •
>
> What is quite natural and feasible for one company may be entirely impracticable for another because of differences in internal organization, degree of integration, variety of products, complexity of trade channels, methods of sale and delivery,

> range of size and functional status of customers, competitive practices, and many other features of business operation." "Cost Justification Report"—A Report to the Federal Trade Commission By The Advisory Committee on Cost Justification Under the Robinson-Patman Act (March 23, 1956), 13-14.

Thus it may be seen that the Federal Trade Commission's own experts have recommended to it that no specific ritual be created and that each cost justification study be weighed in its own factual context.

This is precisely what the Trial Judge directed the jury to do. (In this case the jury stood in the place of the Federal Trade Commission as the trier of the facts.) For, when commenting on the detailed analysis contained in the expert testimony adduced by respondent in support of its cost justification defense, the Trial Judge told the jury:

> "However, it is entirely up to you as to whether you wish to accept or reject the assumptions made by Gayle and the conclusions which he drew from them." (R. 1255)

He further warned the jury, almost immediately thereafter, that to accept Mr. Gayle's testimony it would have to find that Mr. Gayle's "computations were accurate and in accordance with sound accounting principles, and * * * that his assumptions are justified by the facts". (R. 1255.)

Moreover, when the Trial Judge charged concerning additional savings in cost, which he characterized as "intangible" savings, he expressly told the jury that it could consider only cost savings " * * * which are actually realized by the seller * * * " (R. 1254), and that these intangible savings should be considered by the jury only " * * * for what they are worth * * *." (R. 1257.)

When thus analyzed, the petition does not raise "fundamental" issues of law. Rather, it is an attempt to have this Court guess that the jury went as far as to consider the cost justification defense (the jury may have decided against petitioner on numerous other factual issues such as lack of competition, injury, etc.)—and then to have

this Court hold that *on the facts of this case* the jury was not warranted in upholding the cost defense. Essentially, this is an attempt to obtain reconsideration, *de novo,* of the facts of this case. Such an attempt should not be countenanced.

(b) This case can have no wider applicability than its own particular facts.

As noted above, each cost justification study is *sui generis* (Cost Justification Report, *supra,* p. 14), prepared in the light of the particular facts of the industry or business studied. Any decision, therefore, which might be rendered concerning the instant cost justification defense, based upon the instant record, perforce, could not have any wider applicability than the instant case. What may be argued as inappropriate in the instant case may very well turn out to be "fundamental" to a cost study in the next. This is inherent in cost accounting and the myriad complexities of American business enterprise. Thus each of petitioner's questions would be more correctly stated if modified by the phrase "In this case".

This Court has held that writs of certiorari must be restricted to those cases which present " * * * a problem beyond the academic or the episodic". *Rice* v. *Sioux City Cemetery* (1955), 349 U. S. 70, 74. Accord *Wilkerson* v. *McCarthy* (1949), 336 U. S. 53, 67. The very fact that this cost study must be considered only within the confines of this record and as it pertains to this respondent, makes the case less than "episodic".

Although we shall demonstrate that in any event petitioner's contentions are without merit, we submit that the questions presented herein are solely an attempt to obtain a review of the sufficiency of facts properly submitted to the jury; that the questions are limited to the particular facts of this case; and that, therefore, this case is not an appropriate one for the granting of a writ of certiorari.

ARGUMENT

1. The Trial Judge correctly charged that the jury could consider intangible cost savings "for what they are worth". (Answering Petition, Points 1 and 6.)

The Gayle cost study covered three items of respondent's overall expense, to wit, billing, bookkeeping, and shipping. There remained a total differential of $1,781 for the entire period, which was not accounted for by these items. With respect to this $1,781, however, there is ample proof in the record that there were additional cost savings to respondent, which the jury could justifiably have found accounted for this small differential of about $178 yearly over the ten-year calendar period. These additional cost savings were attributable to the purchasing patterns of respondent's wholesaler customers; and to the expenses incurred by respondent in collecting unpaid bills from petitioner as compared with the prompt credit experience with these wholesalers (R. 938, 849, 1022-1033, 1047, 860, 850, 787, 1032, 1048-1049, 849, 956, 976-1014; Def.'s Ex. OO, 3, 11, 13, 14, 15; R. 1083, Res. App. C. A. 4a).

It was these items to which the Trial Judge referred as "intangible" cost savings, and which he permitted the jury to consider "for what they are worth".

In this connection we note that, contrary to petitioner's mischaracterization, neither the Trial Judge nor the Court of Appeals termed these elements as "conjectural accounting estimates". That expression was used by the Court of Appeals only in discussing the case of *Automatic Canteen Co.* v. *Federal Trade Commission* (1953), 346 U. S. 61.

Legislative History.

That the foregoing elements of cost savings may properly be considered by the jury is established by ample authority, commencing with legislative history. Congressman Utterback stated, in explaining the Robinson-Patman bill, that if predictability and large order placement result in savings to a manufacturer, they may be taken into con-

sideration as cost savings under the bill's cost proviso. Thus Congressman Utterback stated:

> "* * * Or where one customer, devoid of storage facilities, requires spot deliveries during the rush of the season, for which the manufacturer must produce in advance and store himself in order to make the fullest utilization of his plant capacity; while another customer orders for delivery in off seasons, handling the storage himself and saving the manufacturer that cost, such a saving may be expressed in a price differential.
>
> "Or where one customer orders from hand to mouth during the rush of the season, compelling the employment of more expensive overtime labor in order to fill his orders, while another orders far in advance, permitting the manufacturer to use cheaper off-season labor, with the elimination of overtime, or perhaps to buy his raw materials at cheaper off-season prices, such savings as between the two customers may likewise be expressed in price differentials. * * * These examples are illustrative of the way in which the bill permits the translation of differences in cost into price differentials as between the customers concerned, *no matter where those differences arise.*" 80 Cong. Rec., June 15, 1936, p. 9417. (Italics added.)
>
> * * *
>
> "It [i.e., the cost proviso] leaves open *as a question of fact in each case* whether the differences in cost urged in justification of a price differential— whether of operating or of overhead costs—is of one kind or the other.
>
> * * *
>
> "Any physical economies that are to be found in mass buying and distribution, whether by corporate chain, voluntary chain, mail order house, department store, or by the cooperative groupings of producers, wholesalers, retailers, or distributors—and whether those economies are from *more orderly processes of manufacture,* or from the elimination of unnecessary salesmen, unnecessary travelling expense, unnecessary warehousing, unnecessary truck or other forms of delivery, or other such causes—none of them are

> in the remotest degree disturbed by this bill." (Majority Report of Committee on the Judiciary, H. R. 8442, Report No. 2287, 74th Cong. 2nd Sess., pp. 10, 17 (1936). (Italics added.)

Moreover, the Cost Justification Report (*supra,* p. 12) specifically directs that these items of cost be considered:

> "Customer groupings may properly be based not only on quantities sold but also according to the way customers place their orders; whether for immediate delivery or later shipment on a fixed schedule; in large or small orders; placed directly at the factory or through a sales branch; for on-peak or off-peak manufacture, etc. These trade factors may all be reflected in cost and as criteria for customer classification."

The legislative history and authorities, then, are clearly demonstrative of Congress' intent: (a) To allow, as part of the cost defense, differences "* * * no matter where those differences arise", and (b) that the question of cost savings is one "of fact in each case."

The Judge's Charge.

The Judge's charge on these elements (R. 1257-1258) merely called to the jury's attention (1) that there was evidence that respondent's wholesalers over a long period of time made "substantial purchases which were predictable", and which avoided overproduction and losses and (2) that there was evidence showing that with respect to collecting bills it was more costly to collect from petitioner than from respondent's wholesalers. The Judge told the jury that respondent did not attempt to place a dollar value on these elements and that, accordingly, the jury could consider them "for what they are worth." (R. 1257.)

The correctness of the Trial Judge's charge, above, is manifest, particularly when it is read in conjunction with other portions of the charge relating to cost savings. Thus the Trial Judge charged:

> "This means that the only kind of cost savings allowed as a defense under the Act are those which are *actually realized* by the seller from the way in which he delivers the goods or the quantity in which he delivers them." (R. 1254.) (Italics added.)

Answering Petition Point 6.

Respondent never contended, as is argued by petitioner, that respondent's wholesalers' pattern of purchases resulted in lower unit costs or that such lower unit costs were reflected in the cost savings. Petitioner can point to no part of the record where such a statement was made, nor does the Trial Judge's charge so state. What respondent's evidence did show was that predictability and regularity of large purchases resulted in *orderly processes of business* which resulted in savings. And this is solely what the Judge referred to in his charge.

That there is a distinction between *orderly processes* savings and *lower unit cost* savings is demonstrated by Congressman Utterback himself, who approved the *orderly processes savings* (80 Cong. Rec., supra), while on the same page of the Congressional Record he disapproved the *lower unit cost* savings.

Answering Petition Point 1.

In petitioner's Point 1 it is his claim that the Court must narrowly construe the cost defense proviso in the Robinson-Patman Act as permitting only "meticulous cost accounting data." Petitioner argues that because respondent did not place a precise dollar value on these factors of cost saving, it was error for the Trial Judge to let the jury consider them "* * * for what they are worth * * *". Apparently petitioner would have the courts and the Federal Trade Commission tied to an antediluvian concept of cost defense which rejects all elements not proven to the closest mill.

Petitioner's contention in this respect is baseless. The Federal Trade Commission itself has expressly held:

> "Cost studies of the sort present in this matter ordinarily do not afford precise accuracy but must

> necessarily embrace a number of conjectural factors and allocations. * * * Where they are made in good faith and in accordance with sound accounting principles, they should be given a very great weight * * *. Respondent's burden under the act is very great and it should have a liberal measure of consideration when it becomes apparent it has made sincere and extensive efforts to discharge that burden." *In the Matter of Minneapolis Honeywell Regulator Co.* (1948), F. T. C. Docket #4920, 44 F. T. C. 351, 394. See also: *In the Matter of Sylvania Electric Products, Inc.* (1954) F. T. C. Docket #5728, 3 C. C. H. Trade Reg. Rep., Pars. 25,181 and 25,197 (differentials in price are permitted where "reasonably attributable" to cost savings).

Thus it is clear that in each case the determination to be made is whether the difference in price is "reasonably attributable" to the savings in cost.*

In proceedings before the Federal Trade Commission it is the Commission's function to determine whether the difference in price is "reasonably attributable" to the savings referred to. In a treble damage suit tried before a jury, however, it is the jury's function to make this determination. Since the jury was the trier of the facts it had every right to consider these elements "for what they are worth". This is precisely what the Trial Judge charged and what the Court of Appeals held appropriate.

2. The Trial Judge correctly charged the jury with respect to the method used in preparing respondent's cost study—Exhibit 00. (Answering Petition, Points 2 and 3.)

The Gayle Cost Study and How It Was Prepared.

Before Mr. Gayle took the stand, Mr. Madewell, respondent's Traffic Manager, testified that since 1921 he had been

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* In *American Can Co.* v. *Russelville Canning Co.* (8th Cir., 1951), 191 F. 2d 38, 59, 60, the Court of Appeals reversed a District Court decision which applied "too rigid a standard" in determining the sufficiency of an attempted justification.

in charge of billing, shipping, warehousing, correspondence, and complaints, as well as practically everything pertaining to an order, and that as a result of this experience he had "become familiar with the pattern of purchases as represented in particular by the three companies: American News, Baker & Taylor, and McClurg". (R. 1076.)

Based on his experience and his examination of the 1950 invoices of McClurg, Baker & Taylor, and American News, Mr. Madewell testified that the pattern of purchases with respect to number of orders and quantities of titles purchased as shown by the 1950 invoices was approximately the same as the pattern of purchases for those companies during the period covered by the complaint. (R. 1079.) The reason for using the 1950 invoices for these three companies is that in the ordinary course of business respondent had destroyed the invoices for 1941 through 1949 prior to 1955 when the study was prepared. (R. 1078.) Respondent's invoices to petitioner were available for the earlier years because petitioner had retained them.

Mr. Gayle testified that in 1952 he had made a "very detailed analysis of the cost of the billing, bookkeeping, and shipping in Harper's operation * * * based on their actual costs for the year 1951". (R. 1091-1092, 1092-1100.)

He then applied those actual costs to petitioner's invoices from respondent for the period from November 1, 1941 through December 31, 1941, for each of the years 1942 through 1949 and from January 1, 1950 through March 7, 1950. (R. 1101-1102, 1107.) Since these cost data were predicated upon respondent's actual costs for 1951, Mr. Gayle then adjusted these costs for each of the years here involved, based on the difference in wage rates and other factors during each of the years. Thus, for 1942 the cost figure was reduced to 55% (R. 1106) and similar adjustment was made for each of the other years. (R. 1107.)

Mr. Gayle then applied the same cost data in analyzing respondent's 1950 invoices to American News, Baker & Taylor, and A. C. McClurg as he had applied to respondent's

invoices to petitioner, similarly adjusted to the prior years, and thereby determined respondent's costs in doing business with these three companies with respect to the same three items, billing, bookkeeping, and shipping. (R. 1103-1104.) Such cost when divided by the total retail list price of all books purchased resulted in the percentage of cost as related to total purchases. (R. 1104.) The application of such percentage to petitioner's total purchases established the difference in cost to respondent as between petitioner and the three wholesalers—petitioner's alleged chief competitors.

Answering Petition, Points 2 and 3.

Petitioner objects to the submission to the jury of the cost study because adjusted figures of costs were used, although there was no dispute that respondent's actual cost data were not available. Petitioner also objects because the study did not include costs other than billing, bookkeeping, and shipping.

(a) *The adjusted figures:*

At the outset of the charge the Trial Judge told the jury that the jury had to pass upon the credibility of respondent's expert witness, Gayle, even though an expert, and weigh his testimony. He pointed out that this was a tremendous responsibility. (R. 1242-1243.) Further, he pointed out that Mr. Gayle, although an expert witness, was an employee of a company that had worked for respondent and that, accordingly, he had an "interest in the case". The Judge warned the jury that this interest had some bearing "upon whether or not the witness should be believed or not believed, or in the last analysis whether you believe the testimony is credible, or the weight that you should attach to any particular part or to all of that testimony". (R. 1245.)

Further, the Judge warned the jury:

> "However, it is entirely up to you as to whether you wish to accept or reject the assumptions made

by Gayle and the conclusions which he drew from them." (R. 1255.)

He finally warned the jury, almost immediately thereafter, that to accept Mr. Gayle's testimony it would have to find that Mr. Gayle's "computations were accurate and in accordance with sound accounting principles, and • • • that his assumptions are justified by the facts". (R. 1255.)

We submit that, when considered in context, there cannot be any doubt that the Court fairly and completely apprised the jury that it was its duty to weigh the evidence given by Mr. Gayle and to accept or reject the assumptions and methods he used, and, finally, that it was its right to accept or reject Mr. Gayle's testimony completely.

Moreover, the fact is that the Federal Trade Commission on several occasions has accepted cost studies prepared on the basis of one year for the purpose of justifying activities stretching over several prior years.

In *In the Matter of Minneapolis Honeywell Regulator Co., supra,* a 1941 cost study was held by the Commission to have partially justified the respondent's discount schedule, not only for 1941 but for earlier years as well. (44 F. T. C. 351, 380, 381, 393, 394.)

Additionally, in both the *Minneapolis Honeywell* and the *Sylvania* cases, *supra,* the Federal Trade Commission accepted cost studies prepared some years after the period of the alleged violations and after the complaints had been filed.

The Trial Judge therefore correctly admitted the Gayle study into evidence and correctly left to the jury the weight to be accorded to it.

(b) *Non-inclusion of all elements of cost*:

Petitioner insists that a cost study encompassing less than all elements of cost must be disregarded.

The burden which such a rule would impose on a respondent preparing a cost study would be literally unbearable. It would be completely impracticable, if not impossible, to track down each last element of cost.

The experts selected by the Federal Trade Commission to study this entire area have expressly noted the propriety of the "simple" cost study in an appropriate case, the question of whether the case is "appropriate", of course, being one of fact:

> "It is well to note that in some circumstances a very simple cost analysis is the best one. If the price differential is based entirely on some characteristic of the transaction whose cost can be directly measured, attention may be directed at that item of cost *and at no other.*" "Cost Justification Report", *supra,* at p. 15. (Italics added.)

The Trial Judge expressly left it for the jury to decide whether it would accept the theory and technique of respondent's study. This was clearly correct, for the omission from a cost study of any elements of cost can only affect the weight to be accorded to such study.

3. The Trial Judge adequately and correctly charged the jury with respect to the basis used by respondent for comparing the costs of doing business with petitioner and petitioner's alleged chief competitors. (Answering Petition, Point 4.)

The Trial Judge's charge completely summarized petitioner's arguments in this regard, and left it to the jury to weigh and appraise the cost study. Thus the Trial Judge stated:

> "The plaintiff has introduced evidence that the defendant made separate deliveries of books to branches of American News Company at higher discounts than it allowed the plaintiff on shipments of similar quantities. The evidence would justify you in finding that there were no cost savings in the shipment of similar quantities of books by the defendant to the plaintiff and the American News Company branches where they were separately invoiced which would justify the higher discount allowed to American News Company * * *.
>
> Reid says that there were instances where he had approximately the same quantity of books and

> yet he says there was a price differential which was in force against him to his disadvantage with respect to those shipments * * *.
>
> *It is up to you to determine whether or not you can accept or reject any or all of those contentions.* But if we had had a situation in which all of the business to American News Company was all done on the basis of small shipments to branches and then there were price differentials, you can see that obviously in that case there could not be any cost savings, because the shipping, billing and bookkeeping costs would always have been the same." (R. 1261-1262.) (Italics added.)

It is petitioner's contention, however, that it is *never* permissible under the cost proviso of the Robinson-Patman Act to show that in the aggregate there were savings in cost in selling a line of goods to one customer, as compared to another customer, even though on individual transactions the cost justification in one case might exceed the discount allowed, while in another case it would not equal the discount allowed.

This *exact* contention was rejected by the Federal Trade Commission in its recent decision dealing with the cost justification proviso to the Robinson-Patman Act—*In the Matter of Sylvania Electric Products, Inc., supra.*

The cost study presented in this case was patterned precisely upon the cost study presented by Sylvania to the Federal Trade Commission.

Commissioner Carretta in writing the decision for the Federal Trade Commission, in *In the Matter of Sylvania, supra,* expressly commented on this issue as follows:

> *"If a 'weighted average' price is used, the price differential between Sylvania distributors and respondent Philco appears to be substantially cost justified. If the individual prices on the different types of tubes are used to determine the amounts of the price differentials, some of the price differences appear to be more than cost justified while others are not entirely cost justified",* p. 35,329. (Italics added.)

The Commission nevertheless accepted the Sylvania cost study, found that the alleged discrimination had been fully cost justified, and dismissed the proceeding.

Furthermore, the Committee of experts appointed by the Federal Trade Commission to study these problems has expressly approved the *Sylvania* approach:

> "The prices to be compared in Robinson-Patman Act cases may be those of individual commodities, or of a group or 'set', where different items are normally bought and sold as a 'set', or a weighted average of the pieces of a line of related products."
>
> * * *
>
> "Classification or grouping of customers, orders, commodities, and transactions has repeatedly been recognized by the Federal Trade Commission as a *valid business practice. What this means is that it is not necessary to cost-justify each sale transaction or sales to each individual customer.* This is important for cost-justification purposes, since if no transaction or customer could be treated as a member of a class or group the cost of making each individual sale would have to be ascertained. Such refinement would be outside the realm of practicability and would tend to make price uniformity a necessity, regardless of economies of manufacture, sale, or delivery in dealing with certain customers." "Cost Justification Report", *supra,* at pp. 8 and 11. (Italics added.)

It is clear that, as held herein by the Court of Appeals, the propriety of "aggregating" or "averaging" is a question of fact in each case.* The Trial Judge, therefore, properly left this entire question to the jury (R. 1261-1262).

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* The *Sylvania* case is not novel doctrine. The Federal Trade Commission has permitted cost studies based on "averaging" or "aggregating" concepts in the following cases: *In the Matter of U. S. Rubber Co.* (1939), F. T. C. Docket No. 3685, 28 F. T. C. 1489; *In the Matter of U. S. Rubber Co.* (1950), F. T. C. Docket No. 4972, 46 F. T. C. 998; *In the Matter of Minneapolis Honeywell Regulator Co.* (1948), F. T. C. Docket No. 4920, 44 F. T. C. 331.

4. Any question concerning the Trial Judge's charge that a partial cost justification could be deducted *pro tanto* from an award of damages is moot. (Answering Petition, Point 5.)

Petitioner's contention reduces itself merely to this: A cost justification which justifies only part of an alleged differential cannot act as a complete defense to a charge of discrimination. With this truism we fully agree, but such is not the case here. We have demonstrated above that respondent's cost study and the testimony in the record relating to savings other than those reflected by the cost study were submitted to the jury for its consideration as to whether thereby respondent fully cost justified any alleged price differential.

Thereafter, the Trial Judge told the jury that should it find all of the necessary elements of a violation, in computing damages it could deduct from whatever discrimination it found the amount of justification shown by the Gayle report (R. 1262, 1263).

The jury, however, found for the respondent. *This can only mean that it never reached the question of the measure of damages.*

Accordingly, any conceivable error in the charge concerning damages is moot and the Court of Appeals so held. *Buckeye Powder Co.* v. *Dupont Powder Co.* (1918), 248 U. S. 55.

In any event, the charge is sustained by authority. The one court which has passed on the question has ruled that a cost justification, even if falling short of justifying an entire discrimination, and thus not a complete defense, nevertheless will reduce damages *pro tanto*. *American Can Co.* v. *Russellville Canning Co.* (8th Cir., 1951) 191 F. 2d 38, 56. Although petitioner implicitly claims conflict in this regard between the Fifth Circuit's decision in *American Can Co.* v. *Bruce's Juices, Inc.* (5th Cir., 1951) 187 F. 2d 919 and the decision of the Eighth Circuit in the *Russellville* case, *supra*, such conflict, on analysis, does not

exist.* The Fifth Circuit in *Bruce's Juices, supra,* at no point discussed the question of a *pro tanto* reduction of damages. Moreover, this question was not considered by this Court in either *Federal Trade Commission* v. *Morton Salt Co.* (1948), 334 U. S. 37, or *Bruce's Juices, Inc.* v. *American Can Co.* (1947), 330 U. S. 743, and, accordingly, the decision in the *Russellville* case *could not* conflict with those decisions, contrary to the assertions of petitioner (Petition 24-25.)

5. The Trial Judge acted entirely within his prerogative in commenting, as he did, on Defendant's Exhibit P. (Answering Petition, Point 7.)

Petitioner, on his direct examination, had testified that a fire suffered by him at his business premises on March 17, 1947, had been an inconvenience "and that it was a temporary problem but did not have any permanent effect at all" (R. 113).

Defendant's Exhibit P, a letter prepared by petitioner and sent by him to some of his creditors sometime between 1948 and 1950 (R. 235-236), directly contradicted his testimony as above set forth (Def.'s Ex. P, R. 235, Res. App. C. A. 1a).

Against this background and against the background that petitioner had testified on every basic issue involved in this case, the Trial Judge commented on Exhibit "P". He prefaced his remarks by telling the jury that he was commenting on the exhibit because

> "* * * it affects the credibility of Reid to a very important extent and must be considered by you in connection with the weight that you attach to his testimony and to the claim which he makes in this case" (R. 1266).

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* Petitioner does not assert a conflict between circuits as a basis for certiorari, either under "Questions Presented" (Petition, 3-4) or under "Reasons for the Granting of the Writ" (Petition, 14-15). Rather, he leaves the alleged conflict to implication and confusing language in an argument late in his petition. (Petition, 24-25.)

Thereafter, the Judge reviewed the letter and its impact on petitioner's credibility (R. 1266-1268). However, the Judge was careful to point out repeatedly to the members of the jury that they were the exclusive judges of the facts and that they were not to infer from any of his references to facts that he had an opinion or wished to inflict that opinion upon them. (R. 1225, 1227-1228, 1241, 1279-1280.)

Petitioner urges that the Trial Judge erred in his charge with respect to his comments on Exhibit P in that it permitted "* * * The injection of a motive criterion into a statutory action for price discrimination * * *". This claim of petitioner is negatived by the first sentence delivered by the Judge on this aspect when he pointed out that the reason for his commenting on the exhibit was the effect it might have on petitioner's credibility. (R. 1266.)

Furthermore, as pointed out by the Court of Appeals:

> "* * * the trial judge properly informed the jury that the plaintiff's motive for bringing the action had absolutely no bearing on his rights under the Robinson-Patman Act, but was relevant only to the extent that it bore on his credibility as a witness."

Nor is there any merit to petitioner's contention that the Trial Judge went beyond permissible limits in commenting as he did with respect to defendant's Exhibit P.

It is fundamental that a federal judge may comment upon evidence and even express an opinion, provided he tells the jury that they need not adopt his opinion and that they are the exclusive judges of the facts. *Daniels* v. *Goldberg* (2nd Cir., 1949), 173 F. 2d 911, 917.

Quercia v. *United States,* (1933), 289 U. S. 466, cited by petitioner, does not hold to the contrary. However, in that case, this Court found that the trial judge had committed reversible error, not because he had commented on the evidence but because he had *added* to the evidence and had based his instruction upon his own addition.

We submit that the comments of the Trial Judge herein referred to did not transgress permissible limits.

Conclusion

The case does not conflict with any decision of this Court or of any Court of Appeals. Nor does it raise any important question of Federal law warranting review.

Respondent urges that the petition be denied.

Respectfully submitted,

HORACE S. MANGES,
60 East 42nd Street,
New York 17, N. Y.,

ALEXANDER S. ANDREWS,
46 Cedar Street,
New York 5, N. Y.
Attorneys for Respondent.

Of Counsel:
HORACE S. MANGES,
JACOB F. RASKIN,
IRA M. MILLSTEIN,
WEIL, GOTSHAL & MANGES.